Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

PLANNED PARENTHOOD OF THE BLUE RIDGE, *et al.*,

Petitioners,

v.

JAMES L. CAMBLOS, in his official capacity as Commonwealth's Attorney for the County of Albemarle, and as a representative of all Commonwealth's Attorneys in Virginia,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF JAMES L. CAMBLOS, COMMONWEALTH'S ATTORNEY FOR THE COUNTY OF ALBEMARLE, IN OPPOSITION

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QUESTIONS PRESENTED

1. The Court has expressly left open the question of whether a parental notice statute must contain a judicial bypass. Should the Court now decide this question, even though (a) the Virginia parental notice statute contains such a bypass, (b) the *en banc* court of appeals unanimously decided that this bypass would meet the requirements imposed on parental consent statutes, and (c) petitioners have not challenged this conclusion? If so, should the Court ignore the differences between notice and consent so as to hold both to the same standard?

2. Should the Court remand this case for the taking of additional evidence, even though (a) in oral argument below, petitioners waived any right to present additional evidence, (b) petitioners have proffered no evidence, (c) the issues in dispute are not factual, and (d) because of the unchallenged adequacy of the judicial bypass, the issues on which they seek evidence could not affect the ultimate disposition of the case?

3. The Court has never undertaken to define, in a single case, the specific parameters of parents' rights to direct the education and upbringing of their children. Should the Court now do so in order to forestall future challenges to various statutes potentially affecting these rights?

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BRIEF OF JAMES L. CAMBLOS, COMMONWEALTH'S ATTORNEY FOR THE COUNTY OF ALBEMARLE, IN OPPOSITION

Respondent, James L. Camblos, Commonwealth's Attorney for the County of Albemarle ("the Commonwealth"), respectfully submits this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

The decision was unanimous. The ten judges who heard this case in the court of appeals all agreed: the Virginia Parental Notice Act is constitutional. Such unanimity on an *en banc* court is rare and, standing alone, casts grave doubt on the worthiness of the petition for certiorari.

Six judges held that a parental notice statute – unlike a parental consent statute – need not contain a judicial bypass. Although four judges disagreed with this holding, the Act *has* such a bypass. All ten judges agreed that, if constitutionally required to have a *Bellotti*-type bypass, the Act's bypass would pass muster. The petition does not challenge this conclusion and, thus, cannot lead to an invalidation of the Act. The abstract constitutional debate sought by the petition is beyond the purpose of certiorari. Moreover, as shown below, it would be a debate to which plaintiffs would bring both misstatements of fact and gross misreadings of this Court's precedent. This is not the sort of case on which certiorari should be granted.

STATEMENT

By enacting its Parental Notice Act, Va. Code § 16.1-241(V) ("the Act"), in 1997, Virginia joined 26 other states[1] that require involvement by parents before physicians may perform abortions on their minor daughters. The Act is a one-parent notice statute. It has an exception for abused minors as well as a judicial bypass. Plaintiffs nevertheless challenged the Act on its face. Rebuffed by a unanimous *en banc* court of appeals, plaintiffs petition for a writ of certiorari. It is a petition replete with misstatements of fact and law, including the following:[2]

Concession at Oral Argument: Plaintiffs contend the court of appeals erred by deciding the case on its merits rather than remanding it to the district court for presentation of additional evidence. *See* Pet., Questions Presented, No. 2. The petition disputes the court of appeals' account of the concession made by plaintiffs at oral argument,[3] and claims the transcript of oral argument supports their

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[1] *See American Academy of Pediatrics v. Lungren*, 912 P.2d 1148, 1161, n.10, 12 Cal. 4th 1007, 1030, n.10 (1996)

[2] While some discrepancies may bear only limited relevance to plaintiffs' narrowly framed questions presented, the Commonwealth believes it may be helpful to assuage any concerns about the Act that the accumulation of multiple misstatements might otherwise engender. Thus, the Commonwealth provides a more comprehensive correction to the misstatements of the petition than required under Supreme Court Rule 15(2).

[3] The court of appeals said: "Recognizing that this dispute is ripe for consideration on the merits, *the parties themselves agreed at oral argument that further proceedings in the district court are not necessary* and that resolution of the merits of the dispute by this court would be appropriate." Pet. App. 16, emphasis added.

denial. Pet. 7, n.7. Yet, they have shown no transcript to the Court. Moreover, a tape of the oral argument on file with the Fourth Circuit clerk's office records the following exchange at the conclusion of plaintiffs' argument:

> COURT: We could, we could go ahead under, under *Thornburg I* and actually address the merits and resolve them even at the preliminary injunction stage by holding, at least a holding, that the judicial bypass is not, not required in a notice statute case.
>
> COUNSEL: Absolutely. This court could resolve the merits on this appeal. Thank you, your honor.
>
> [End of plaintiffs' argument]

Thus, plaintiffs made exactly the concession they now deny having made.

Evidence in Record: Plaintiffs are also disingenuous when, without further explanation, they describe the preliminary injunction hearing as "non-evidentiary". Pet. 6. The district court had before it 15 affidavits, together with many attached exhibits, creating a factual record of hundreds of pages. Plaintiffs' claim that they "have not had an opportunity to present evidence on critical facts" (Pet. at 6-7) is wholly without merit.

Confidentiality of Social Services: The petition complains that, by triggering the rescue of an incest victim, the Act's requirement that abuse be reported might allow her parents to learn of her abortion. Pet. 3, n.4. This betrays an utter lack of familiarity with Virginia social service procedures. In Virginia, social service agencies are required by regulation to keep confidential the identity of

those who report child abuse and neglect.[4] 22 VAC 40-705-40(E) ("When the identity of the reporter is known to the [State] Department [of Social Services] or local department, these agencies shall make every effort to protect the reporter's identity.") In order to overcome this requirement of confidentiality, the allegedly abusive parent must petition the circuit court and show, *inter alia*, a reasonable probability that the report was made with bad faith or malicious intent. Va. Code § 63.1-248.5:1. In light of these safeguards, it is extremely unlikely a parent would ever learn that the report came from a physician. Since the involvement of an abortion provider would be kept confidential, so, too, would the performance of the abortion. Additionally, the petition erroneously attributes to the court of appeals a holding that post-abortion notice to the parents of an abused minor would be permissible. Pet. 8. The court of appeals said no such thing.

Confidentiality of Records: The petition again misstates the case when it says "the Act contains no guarantee that court *records* or proceedings shall be confidential." Pet. 4 (emphasis in original). The Act's requirement to keep *proceedings* confidential would not be met if *records* of those proceedings were made available.

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[4] In light of this regulation, the risk of inadvertent parental notice of an abused minor's abortion decision is even more remote than the court of appeals described it. Pet. App. 51, n.8. Moreover, the Act did not create the reporting requirement. Since 1975, *all* Virginia physicians have been required to report suspected cases of child abuse or neglect. Va. Code § 63.1-248.3. 1975 Acts of Assembly, ch. 341.

Expeditiousness: The petition acknowledges that, under the Act, judicial bypass petitions must be heard by the Juvenile and Domestic Relations District Court ("JDR court") within four days of filing, but suggests the JDR court might delay a decision indefinitely. Pet. 5. The petition fails to mention significant facts bearing upon the speed with which the JDR courts render decisions on bypass petitions. Before hearing oral argument on March 3, 1998, the court of appeals granted the Commonwealth's unopposed motion to take judicial notice of facts pertaining to the operation of the Act between July 1, 1997 (when the Act took effect) and January 30, 1998 (the last month for which figures were available). These facts show that *every* bypass petition was heard *and decided* by the JDR court not later than the fourth day after filing.[5]

Emancipation in Virginia: In a claim not previously raised, the petition suggests there may be a class of minors who are emancipated, but who are denied the benefit of emancipation under the Act. Pet. 2, n.3. In fact, the converse is true. The benefits of the Act are broader. The bases on which a minor may obtain complete emancipation were codified by the 1986 enactment of Va. Code § 16.1-331 *et seq.* The Act starts with those same bases, but it does not stop there. Unlike the emancipation statute, the Act omits any age requirement as well as any requirement that the minor be capable of supporting herself and competently managing her own financial affairs. *Compare*

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[5] In one case, the fourth day fell on Saturday of the July 4th weekend. That petition was carried over and decided on July 7th, the next business day, a method of computation authorized by Va. Code § 1-13.3:1. *See also* Pet. App. 59-62.

Va. Code § 16.1-241(V) *with* §§ 16.1-331 and -333(iii). Thus, plaintiffs' concern is misplaced.

Medical Emergency: Plaintiffs are wrong when they deny waiving any right to object to the Act's medical emergency provision. The Commonwealth cannot find any such issue in their Complaint or in any other document filed in the district court. Moreover, it is not included among their questions presented. In any case, their objection to the Act's medical emergency provision is misplaced, because the Act uses language *less restrictive* than what has been already approved by the Court. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992) (citing 18 Pa. Cons. Stat. § 3203 (1990)); *see also* Pet. App. 49, 50, n.7 (majority opinion discussion of the Act's medical emergency provision).

Notice by Certified Mail: The petition misstates how notice under the Act may be accomplished by certified mail, saying that notice must be "delivered" 72 hours before an abortion. Pet. 3. The Act says nothing about when the notice must be delivered, only when it must be mailed.

Appellate Review: Contrary to plaintiffs' suggestion (Pet. 5), an appeal to the Virginia Court of Appeals from an unfavorable bypass decision is available under Va. Code § 17.1-405 (formerly § 17-116.05). An appeal to the Virginia Supreme Court from the Court of Appeals also may be granted in appropriate cases. Va. Code § 17.1-410

(formerly § 17.116-07). Confidentiality and expeditiousness are provided by the Act and/or by Virginia Supreme Court Rules 5A:13(c) and 5:18(c).[6]

"May" and "Shall": Plaintiffs complain about the court of appeals' decision – based squarely on state law – that "may" must be construed as "shall" if necessary to save the Act from unconstitutionality.[7] Pet. 8. Their complaint is flawed both legally and factually. Because this issue is not included in their questions presented, little need be said about it here, other than to alert the Court that the petition does not faithfully describe the views of the majority below, but confuses two entirely different parts of its opinion. *Compare* Pet. 8 *with* Pet. App. 55 and Pet. App. 66-67. Similarly, plaintiffs do not fully or accurately describe the guidance given by the Executive Secretary of the Virginia Supreme Court on this issue. *Compare* Pet. 4, 8, n.8 *with* Pet. App. 58-59, 61.

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[6] Plaintiffs' complaint that an appeal from JDR court to the circuit court is *de novo*, rather than on the record, is odd. Pet. 5. An appeal *de novo* is more favorable to the appellant because it allows the introduction of better evidence, and thus a greater chance of a different decision. Under the Act, the only party – and only possible appellant – is the minor.

[7] Even though plaintiffs now argue the court of appeals should have certified the interpretation of the word "may" to the Virginia Supreme Court (Pet. 8, n.8), they never sought such certification in the court below and, even now, do not include that issue among their questions presented. Moreover, concerns about violating federalism or comity are misplaced when a federal court *sustains* a state statute based on its assessment of how the state's highest court would interpret it.

REASONS TO DENY THE WRIT

The Petition purports to identify two reasons why certiorari should be granted. Neither reason can withstand scrutiny. First, the petition says the decision by the court of appeals conflicts with decisions of this Court on three important issues of federal law. Only by grossly misreading Supreme Court precedent – and by ignoring their own concession – can plaintiffs make such an assertion. Second, the petition says there is a conflict among the circuits. But any such conflict as may be found is more limited than plaintiffs contend, and this case does not furnish an adequate opportunity to resolve it. Moreover, the petition is flawed at the outset because the questions presented are so narrowly framed that, while they challenge one rationale used by the court of appeals, they do not challenge another, independent rationale that wholly supports the judgment below.

I. THE COURT OF APPEALS' JUDGMENT CANNOT BE OVERTURNED ON THE QUESTIONS PRESENTED BY PLAINTIFFS.

Even if plaintiffs could somehow prevail on all three questions presented, the court of appeals' judgment would still stand. This is so because that judgment, upholding the Act against a facial challenge, is based on two independent grounds, while the questions presented by the petition challenge only one of them.

The court of appeals held that a parental *notice* statute is not subject to the same constitutional requirements that govern parental *consent* statutes, and that a statute requiring notice to a non-abusive, non-absent parent need

not include a bypass for the mature minor in order to pass constitutional muster. Pet. App. 44. All three questions presented deal in one way or another with this holding. But, there is a second holding scarcely mentioned by the petition and based on Virginia law governing the interpretation of Virginia statutes.[8] All ten judges agreed that, if parental notice and consent statutes *were* governed by the same constitutional requirements, the Act would meet those requirements. As the six-member majority wrote:

> Even if we were to accept, as decided law, that a parental notice statute must meet the identical requirements that a parental consent statute must meet in order to be constitutional – not merely that a notice statute that includes a *Bellotti II* bypass is *a fortiori* constitutional, as we do for purposes of our analysis in Part VI.B. – the fact that the Commonwealth's statute can reasonably be interpreted to include a mandatory maturity bypass would in itself still be sufficient to defeat appellees' facial challenge.

Pet. App. 67.

Four other judges were prepared to decide that parental notice and consent statutes must meet the same constitutional criteria. Although in the minority on this

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[8] A third basis to uphold the Act was supported by five judges. In his concurrence, Judge Widner stated that, under Virginia law, it would be an abuse of discretion for a court to deny an abortion to a mature minor, a conclusion apparently founded on the unquestionable obligation of JDR and circuit courts to act in the best interests of the minor. Pet. App. 72. This opinion was supported by Judges Michael, Murnaghan, Ervin and Motz. Pet. App. 87, n.4.

point, they nevertheless concluded that the Act meets those criteria. It was on this basis that these four judges concurred in the judgment of the majority. Their opinion states:

> Under Virginia law a statute that employs the word "may" will be interpreted to be mandatory rather than permissive if that is what the Constitution requires. Since the Constitution requires Virginia state judges to permit mature young women to obtain abortions without parental notice, the word "may" must be interpreted as a mandatory term. For that reason alone, I concur in the judgment that the Virginia statute is not unconstitutional on its face.

Pet. App. 74.[9]

Thus, the *en banc* court of appeals was *unanimous* in its view that the Act complies with any constitutional requirements to which it might be subject under *Bellotti v. Baird*, 443 U.S. 622 (1979) ("*Bellotti II*") and related cases. The petition sometimes strays from the questions presented to fulminate against this conclusion; however, none of the questions presented challenge it and plaintiffs' gratuitous criticisms cannot be considered. Sup. Ct. R. 14(1)(a). Thus, the judgment of the court of appeals cannot be disturbed and the petition is simply an invitation to issue an advisory opinion. It is an invitation this Court should decline. As the Court has long emphasized, its role "is to decide actual controversies by a judgment

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[9] Plaintiffs' arguments that the Act fails to meet the confidentiality and expeditiousness requirements of *Bellotti II* were not deemed worthy of mention by the four judges concurring in the judgment.

which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895). The Court need go no further in considering the petition. Certiorari should be denied.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S JURISPRUDENCE GOVERNING PARENTAL NOTICE STATUTES.

A. Their First Question Presented Is Based On A Misreading Of Supreme Court Precedent.

The first question presented by plaintiffs is based on their erroneous view that Justice Powell's plurality opinion in *Bellotti II* settled the question of whether a parental notice statute must have a judicial bypass. In an exercise reminiscent of reading tea leaves, plaintiffs spend pages poring over *Bellotti II* for any sign that might be taken as an omen favorable to their position. Pet. 12-16. The Commonwealth will not respond in kind. Such exegesis of *Bellotti II* is unnecessary. The Court has said plainly that the issue is open.

In *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (*"Akron II"*), the Court said:

> This dispute turns, to a large extent, on the adequacy of [the Ohio statute's] judicial bypass procedure. In analyzing this aspect of the dispute, we note that, although our cases have required bypass procedures for parental consent statutes, *we have not decided whether parental notice statutes must contain such procedures. We leave the question open* . . .

497 U.S. at 510 (emphasis added) (citations omitted). *See also Lambert v. Wicklund*, 520 U.S. 292, ___, 117 S. Ct. 1169, 1171 (1997) (reiterating that the Court has "declined to decide whether a parental notification statute must include some sort of bypass provision to be constitutional.").

The Court has made it perfectly clear that the issue is open. It is folly for the petition to pretend otherwise or to suggest that "a generation of young women" (Pet. 10) have relied upon a decision the Court has never made. Indeed, at one point, even plaintiffs admit – as they must – that the issue is "open". Pet. 17. Plaintiffs seek to avoid the consequences of their concession by hedging it with the suggestion that the question is only open "technically". *Id.* No such modifying adverb was used by this Court in describing the state of the law in *Akron II* and *Lambert*. The question is open, period.[10]

The petition also tries to escape the plain teaching of *Akron II* by its multiple misreadings of *Hodgson v. Minnesota*, 497 U.S. 417 (1990). *Akron II* and *Hodgson* were decided the same day. It would be very surprising to find any inconsistency between them. Nevertheless, plaintiffs stake their chances of certiorari on reading, between the

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[10] The petition tries to use the concurring opinion of Justice Stevens in *Akron II* to create a distinction between *judicial* bypasses and bypasses in some other, unidentified form. Pet. 17. The view that some type of non-judicial bypass is required has never been adopted by a majority of the Court. Moreover, *Lambert* describes the undecided bypass issue in terms broad enough to foreclose the distinction plaintiffs seek to make. *Lambert*, 520 U.S. at ___, 117 S. Ct. at 1171.

lines of *Hodgson*, a teaching that *Akron II* rejects in its plain text.

First, plaintiffs say the decision below violates *Hodgson's* reaffirmation of *Bellotti II*'s requirement that a mature minor be allowed to make the abortion decision "independently." Pet. 18. Nothing in the Act requires minors to obtain the consent of their parents, nor even to consult with them. So, plaintiffs equate the abortion decision with the abortion procedure and construe the term "independently" to mean "without notice." But, there is an obvious difference between a minor's making her decision independently and her having the abortion in secrecy from her parents. To suggest that this Court implicitly meant to equate the two concepts not only runs afoul of logic and the English language, it flatly contradicts the explicit statements in *Akron II* and *Lambert* that the issue is an open one.

Second, in an effort to recast *Hodgson* to suit themselves, plaintiffs ask this Court to read Justice O'Connor's concurring opinion not just as a criticism of Minnesota's faulty abuse exception, but as a much broader judgment that all abuse exceptions are constitutionally suspect. Pet. 18. Justice O'Connor issued no such sweeping condemnation.[11] Moreover, as the court of appeals readily

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[11] The decision by the court of appeals contains an extensive and persuasive analysis of Justice O'Connor's concurring opinion in *Hodgson*. Pet. App. 51, n.8. But even without this analysis, there is no way that Justice O'Connor's opinion – or *Hodgson* in general – can be read to *foreclose* the judgment reached by the court of appeals or the rationale of its majority. The alleged conflict with existing Supreme Court jurisprudence does not exist.

recognized, the safeguards adopted by Virginia are fundamentally different – and far more stringent – than the troublesome Minnesota procedures at issue in *Hodgson*.

The decision of the court of appeals contains extensive explanation of the confidentiality protections of Virginia law. Pet App. 51, n.8. As the court pointed out, those protections contrast markedly with the Minnesota law giving a parent under investigation "a right of access to the record of the investigation." *Id.* (quoting *Hodgson*, 497 U.S. at 460 (O'Connor, J., concurring in part and concurring in judgment in part) (citation omitted)). Additionally, the Commonwealth has at least one protection not discussed below in that social service agencies in Virginia are required by regulation to keep confidential the identity of persons who report suspected abuse. 22 VAC 40-705-40(E); *see* p. 4, *supra*. Public officials are presumed to discharge their duties properly, absent clear evidence to the contrary. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996). There is no such evidence here. If the court of appeals had focused on this regulation, then its already high confidence in the Virginia procedure would have been even greater. Indeed, whatever danger of inadvertent parental notice may have existed in Minnesota, it is foreclosed in Virginia as a matter of law.

Unable to address this issue with any credible legal argument, plaintiffs rely on a sensational 1989 newspaper story about one Rocky Adams, who was "accus[ed]" of "murdering his daughter after she was impregnated by him and sought an abortion." Pet. 19. But what does that have to do with Virginia? The horrible events to which plaintiffs allude did not occur here, but in Oregon. Rocky Adams did not learn of his daughter's abortion through

any breach in the wall of confidentiality erected by the Commonwealth. For plaintiffs to seek certiorari based on an event so irrelevant to the case at bar serves only to underscore the petition's lack of merit.

Third, the petition criticizes the court of appeals for the "breathtaking assumption" that "state interests supporting parental notice are advanced rather than undermined by a statute that grants judges the discretion to compel parental notice for a mature minor." Pet. 19. This is puzzling. To say that a state's interests in parental notice are advanced by requiring notice is hardly breathtaking. It is a tautology.

In sum, plaintiffs cannot sustain their claim that the court of appeals' decision is contrary to the jurisprudence of this Court. Their first question presented is without merit.

B. Their Second Question Presented Has Been Waived, And Is Otherwise Inappropriate For Certiorari.

By their second question presented, plaintiffs seek to remand the case to the district court for the taking of additional evidence. Such a remand has been waived. In proceedings below, when presented with the suggestion that the case was ripe for a decision on the merits, plaintiffs' response was "Absolutely".[12] As shown by their opinions on the merits, all ten judges agreed. *See, e.g.*, Pet. App. 16. Plaintiffs' concession was appropriate, and it is

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[12] *See* excerpt from tape of oral argument, p. 3, *supra*.

now too late for them to retract it. Moreover, they identify no evidence they would submit if the matter were to be somehow remanded. Their ruminations about what additional evidence "could" show are pure speculation. *See* Pet. 21, n.18. Certiorari on this issue would be both improper and pointless.

Additionally, what plaintiffs belatedly seek to portray as issues of fact are clearly matters of law, including matters on which this Court has already spoken. For example, they claim that whether parental consent is more burdensome than parental notice is a factual matter. Pet. 7. Yet, this Court has already recognized the "greater intrusiveness of consent statutes" as compared to notice statutes. *Akron II*, 497 U.S. at 511.[13]

Plaintiffs also claim the court of appeals "improperly assumed" that mature minors will benefit from notice to non-abusive parents. Pet. 21. Yet, the benefits of parental notice have been recognized repeatedly:

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help

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[13] Contrary to plaintiffs' suggestion, whether a statute creates an undue burden is a question of law, not a question for the finder of fact. Moreover, the usefulness of an extensive factual record in making the legal judgment varies greatly depending upon whether the Court has previously passed upon the burden created by the particular type of statute at issue. In *Casey* for example, the Court reviewed a spousal notice requirement for the first time, and thus engaged in a degree of factual examination unnecessary in this case where the Court has previously ruled on the constitutionality of parental notice statutes.

> and advice of her parents in making the very important decision whether or not to bear a child.

Hodgson, 497 U.S. at 444 (Stevens, J. and O'Connor, J.) (concurring) (citation omitted).

It is not surprising that the Court has thus far declined to make an exception to this principle when the minor is mature. There are legitimate state interests – recognized by this Court – that plainly are not satisfied just because a minor is mature enough to make the ultimate decision whether to have an abortion. For example:

- For a minor to be mature enough to make her own abortion decision does not mean she will know the medical history that can be crucial in avoiding complications, including infertility and death. *See H. L. v. Matheson*, 450 U.S. 398, 411 (1981) (parental notification serves "a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician . . . ").

- Maturity does not immunize a minor against the possibility of post-abortion complications, nor does it eliminate the benefit of having a parent supervise post-abortion care. *See Hodgson*, 497 U.S. at 429, n.11 (noting importance of parental notice continues even after abortion is performed).

- Parents have a moral and legal responsibility to provide their minor daughter with necessary care. *See Buxton v. Bishop*, 185 Va. 1 (1946) (recognizing parents' common law liability to third party for necessities furnished to unemancipated minor child); Va. Code § 20-16 (establishing criminal liability for willfully neglecting to

provide support and maintenance of minor child). By promoting early detection of post-abortion complications, parental notice helps avoid the sometimes devastating financial and other consequences of complications that fester in secret.

- The need for parental supervision of a minor's post-abortion care – instead of self-supervision – is especially acute since the potential complications include psychological problems that may easily elude self-detection. *See Hodgson*, 497 U.S. at 429, n.11 (parental notice can help support a minor's psychological health).

- Considerations of family integrity are also important even after a minor daughter has become mature enough to make the abortion decision on her own, and they continue to be important through the date of her emancipation, whether by age or otherwise. *Matheson*, 450 U.S. at 411 (parental notice statute addresses "important considerations of family integrity").[14]

In light of this galaxy of concerns, even if the Court were one day to decide that a parental notice statute must have a judicial bypass, it is unlikely simply to duplicate the requirements that *Bellotti II* imposes in the context of parental consent statutes. This is not, however, the day to address such an issue because the court of appeals held the Act would meet any requirements that might be imposed even under a *Bellotti II* standard and because this holding is not challenged in the questions presented by plaintiffs.

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[14] The court of appeals' discussion of state interests appears at Pet. App. 32-39.

C. Their Third Question Presented Seeks Debate Over Statutes Not At Issue Here.

In discussing their third question presented, plaintiffs reveal their desire to conduct a pre-emptive defense of laws they fear might be imperiled by a vigorous assertion of parental rights. They focus on the Virginia law treating minors as adults for purposes of consenting to a range of health care services involving sexually transmitted diseases, birth control and pregnancy, substance abuse, mental illness and emotional disturbance. Pet. 24 (citing Va. Code § 54.1-2969(D)(1)-(4)). The Commonwealth does not share plaintiffs' concern that its law is jeopardized by the decision below, and believes that plaintiffs' frenzied concern is wholly unnecessary.[15] These statutes were not at issue in the case below. Indeed, the court of appeals never so much as mentioned them, much less suggested how it would rule if constitutional challenges were to be mounted. Such challenges, if they ever come, must be decided on an individual basis, not by the wholesale approach sought by plaintiffs in their request for certiorari.

Moreover, the Court need not take up this case in order to set down the broad principles by which future contests over parental rights must be decided. It has

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[15] Plaintiffs also try to incite alarm by claiming that, under the court of appeals' decision, even adult women would be forced to consult with their parents before having abortions. Pet. 24-25, n.21; 28. Such an intellectually undisciplined argument is so transparently meritless as to require no response, and is a further indication of the inappropriateness of this case for certiorari.

already done so, and anyone wishing to challenge – or defend – any statute implicating those rights has ample authority on which to draw. Parents are supported by a long line of cases recognizing the right "to direct the education and upbringing of one's children." *Washington v. Glucksberg*, 521 U.S. 702, ___, 117 S. Ct. 2258, 2267 (1997) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). *See also Ginsberg v. New York*, 390 U.S. 629, 639 (1968). Even so, parental rights are not absolute. "Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).[16] States have authority to *support* the role of parents as well as authority to *limit* parental decisions in some circumstances so as to protect the welfare of children. *See Ginsberg*, 390 U.S. at 639 ("Parents [have] primary responsibility for children's well-being [and] are entitled to the support of laws designed to aid discharge of that responsibility.") and *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding authority of states to enact laws prohibiting child labor even when labor is approved by parents).

The Court has not sought to define in the abstract the exact parameters of these sometimes competing, sometimes concurring principles. How they might play out in

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[16] The role of the Constitution in fixing boundaries between the rights of parents and the rights of their children was expressly recognized by the court of appeals when it referred to the parents' right "to rear their child as they see fit, and to participate fully in that child's life, as free from governmental interference as *constitutionally permissible*." Pet. App. 32 (emphasis added).

the context of any particular statute must await a case and controversy dealing with that statute. To pass upon such statutes in advance, by using this case to codify the interplay of applicable principles, would not be in keeping with the caution exercised by this Court in developing its constitutional jurisprudence. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Clinton v. Jones*, 520 U.S. 681, ___ n.11, 117 S. Ct. 1636, 1642, n.11 (1997) (citation and internal quotation marks omitted); *see also* Pet. App. 70 (Wilkinson, C. J.) (explaining that the philosophy of judicial restraint rests on the understanding that "astronomers of the bench do not have all the answers to such questions as: When does human life begin? Where does the role of the state in intimate decisions end?").

Finally, in the context of the case at bar, it makes absolutely no difference whether the parental right to know about a minor daughter's abortion derives from the broader parental right to direct the education and upbringing of children, recognized in *Glucksberg*, or whether it derives from the presumption, recognized in *Hodgson*, that it is in the best interest of the children that their parents know about such decisions. *Hodgson*, 497 U.S. at 450.[17] Whatever may be its origin, the Act tempers the right of parental notice with a judicial bypass. Thus, any conflict between the two possible derivations is

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[17] Plaintiffs' suggestion that parents have no independent right to know about their children's activities exaggerates and distorts the teaching of *Hodgson*.

safely avoided. In their third question presented, plaintiffs ask the Court to grant certiorari based on differences in nuance that are entirely moot. The Court should not do so.

III. GRANTING CERTIORARI COULD NOT RESOLVE ANY CONFLICT AMONG THE CIRCUITS.

A. The Issue Of Whether A Parental Notice Statute Needs A Bypass Cannot Be Reached.

The petition notes a conflict among the circuits on whether a parental notice statute must contain a judicial bypass meeting the criteria of *Bellotti II*. Three circuits have said that it must do so. The Fourth Circuit has said that it need not. This is not, however, a case where that conflict can be resolved. The Act *has* a bypass. Moreover, all ten circuit court judges agree that the bypass would meet any requirements that may be imposed by *Bellotti II*, a point not challenged by the questions presented in the petition.

In *Akron II*, the Court expressly declined to resolve the open question of whether parental notice statutes must contain judicial bypass procedures. The Court chose not to take up the issue because the statute then before it contained a judicial bypass meeting all constitutional requirements for parental consent statutes. The Court said: "We leave the question open, because, whether or not the Fourteenth Amendment requires notice statutes to contain bypass procedures, [the Ohio statute's] bypass procedure meets the requirements identified for parental consent statutes. . . . " 497 U.S. at 510.

Following the approach of *Akron II*, this Court should not use this case to take up the issue of whether a notice statute needs a bypass. The *en banc* court of appeals held *unanimously* that the Act's bypass passes the test of *Bellotti II*, thereby making this case an unlikely vehicle for reaching the larger issue. Moreover, because plaintiffs frame their questions presented so as not to challenge this holding, any possibility of using this case for resolving a conflict among the circuits on the larger issue has been eliminated.

B. The Issue Of Expeditiousness Is Outside The Questions Presented And Involves No Conflict.

In an apparent afterthought, the petition concludes with a claim that the circuits are in conflict on what is necessary to meet *Bellotti II*'s requirement for expeditiousness in a judicial bypass.[18] The short answer to the argument is that the adequacy of the Act's expeditiousness requirement is not fairly included within any of the questions presented. Sup. Ct. R. 14(1)(a). Additionally, the language by which the Act guarantees expeditiousness was approved by the Court in *Hodgson* and, insofar as the *Hodgson*-approved language is concerned, disagreement among the circuits does not exist.

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[18] The court of appeals' discussion of expeditiousness appears at Pet. App. 59-62. *See also* "Expeditiousness," p. 5, *supra*.

In *Hodgson*, this Court upheld the Minnesota parental notice statute with judicial bypass language making the following provision for expeditiousness:

> Proceedings in the court under this section . . . shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman.

Hodgson, 497 U.S. at 427, n.9 (quoting Minn. Stat. § 144.343(6) (1988)).

The Virginia statute uses virtually identical language. It says:

> Court proceedings under this subsection . . . shall be given precedence over other pending matters so that a court may reach a decision promptly and without delay in order to serve the best interest of the minor.

Va. Code § 16.1-241(V).

Moreover, the Virginia statute also says the hearing must be held "as soon as practicable and *in no event later than four days after the petition is filed.*" *Id.* (emphasis added). By contrast, the Minnesota statute gave *no* deadline for when the hearing must be held. Because the Minnesota statute is constitutional, then *a fortiori* the Virginia law is constitutional.[19]

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[19] This Court has *never* required bypass proceedings to contain a deadline for decision-making expressed with mathematical specificity. *See Akron II*, 495 U.S. at 514 (describing *Ashcroft* as upholding bypass procedure that "could require 17

The petition claims the decision by the Fourth Circuit on expeditiousness conflicts with *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991) and *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 357 (1997). *Glick* and *Causeway* are both distinguishable from the case at bar in that the statutes in those cases failed to track the Minnesota language approved by this Court in *Hodgson*.

The Nevada statute invalidated in *Glick* did not "require that the district court conduct its petition review with expediency." *See Glick*, 937 F.2d at 441 (citing Nev. Rev. Stat. § 442.2555).[20] Likewise, the Louisiana statute invalidated in *Causeway* contained provisions for expeditiousness markedly different from those used by the Act. It required that the bypass petition be decided "in a

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calendar days plus a sufficient time for deliberation and decision-making at both the trial and appellate levels."); *Planned Parenthood Assoc. of Kansas City, Missouri v. Ashcroft*, 462 U.S. 476 (1983) (upholding Missouri statute that specified how quickly the bypass hearing must be held, but did not expressly state how quickly thereafter a decision must be rendered).

[20] The Ninth Circuit was also unpersuaded that the Nevada statute was similar to the Missouri statute upheld in *Ashcroft*, noting that Nevada failed "to support their argument with evidence that the Missouri statute did not impose a time constraint on the district court's review of a minor's petition." 937 F.3d at 440. The Ninth Circuit reached this conclusion without its attention being drawn to that portion of *Ashcroft* containing the text of the Missouri statute. If the court's attention had been so directed, it would have noted that the Missouri statute *does not* contain a specific deadline. *See Ashcroft*, 462 U.S. at 479, n.4. Certiorari in the case at bar is an inappropriate remedy to correct the failure in *Glick* to read carefully the plain text of *Ashcroft*.

summary manner." But, under Louisiana law, this only meant "as soon as practicable" or "whenever practicable." *Causeway*, 109 F.3d at 1110 (citing La. Civ. Code art. 2595 (West 1996)). This was a far less rigorous demand than the Minnesota and Virginia requirements that petitions be given "precedence" and decided "promptly and without delay."

In sum, the statutes in *Glick* and *Causeway* were materially different from both the Minnesota statute approved by this Court in *Hodgson* and the Virginia statute approved by the Fourth Circuit in the case at bar. Thus, the alleged conflict between the circuits on the issue of expeditiousness is illusory.

CONCLUSION

Reeling from a unanimous defeat before an *en banc* court of appeals, plaintiffs come to this Court with a petition that is fundamentally flawed. Their questions presented are framed so as to challenge part of the rationale used by the court of appeals, but not its ultimate judgment that the Act is constitutional. Moreover, their petition is predicated on a gross distortion of Supreme Court precedent, on a misrepresentation about their concession before the court of appeals, on a desire to litigate the constitutionality of statutes not at issue here and on circuit court conflicts that are non-existent or that cannot be reached because of the narrow framing of their

questions presented. This petition should not be granted. Certiorari should be denied.

Respectfully submitted,

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